



Telephone
Facsimile

(202) 639 8222
(202) 434 8867

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December 16, 1996

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, DC 20554

Federal Communications Commission
Office of Secretary

Re: Ex Parte Presentation -- MCI/BT Transfer of Control
GN Docket No. 96-245

Dear Mr. Caton:

On December 13, 1996, Chris Hobson (General Manager -- Market Access, Regulatory Affairs Department, British Telecommunications plc), James E. Graf II (President, BT North America Inc.), Jeanne Schaaf (Vice President, Government Relations, BTNA), Joel Winnik (Hogan & Hartson), Mary L. Brown (Senior Policy Counsel for Federal Law and Public Policy, MCI Telecommunications Corp.) and Sanford C. Reback (Senior Counsel for International Affairs, MCI) met with Diane Cornell (Chief, Telecoms Division, International Bureau, FCC), Kerry E. Murray (Attorney-Advisor, International Bureau, FCC), Robert Pepper (Chief, Office of Plans & Policy, FCC), Michael Pryor (Attorney, Common Carrier Bureau, FCC), Tom Boasberg (International Bureau, FCC), Jamie Hedlund (International Bureau, FCC), Joanna Lowry (International Bureau, FCC), Mark Uretsky (International Bureau, FCC), Jim Earl (Office of General Counsel, FCC), Glenn Reynolds (Common Carrier Bureau, FCC), John Adams (Common Carrier Bureau, FCC), and Pieter Van Leeuwen (Wireless Telecommunications Bureau, FCC) to discuss certain matters related to the merger of BT and MCI and the transfer of control application that is captioned above.

Specifically, the parties discussed the regulation of telecommunications in the UK and BT's UK license. During the meeting, the following documents were distributed: "Introduction to Regulation of Telecommunications in the United Kingdom with Particular Reference to BT" and "BT/MCI Summary of European Community Merger Control Process" (copies enclosed).

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An original and one copy of this notice and enclosures are being submitted to the Secretary of the FCC, with additional copies to ITS, the International Reference Room, and the Wireless Reference Room, in accordance with the Commission's December 10, 1996 Public Notice in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Joan M. Griffin". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Joan M. Griffin
Its Attorney

Enclosure

cc: Diane Cornell
Kerry E. Murray
Robert Pepper
Michael Pryor
James Hedlund
Tom Boasberg
Joanna Lowry
Mark Uretsky
Michael Pryor
Jim Earl
Glenn Reynolds
John Adams
Pieter Van Leeuwen

BT/MCI SUMMARY OF EUROPEAN COMMUNITY MERGER CONTROL PROCESS

European competition law requires to notify certain planned transactions between undertakings, so-called "concentrations having a Community dimension", with the European Commission in Brussels (the "Commission"). The purpose of this notification is to permit the Commission to control whether notified transactions create or strengthen a dominant position which would significantly impede competition in the European Union or a substantial part thereof, and, if necessary, to prohibit the implementation of these transactions. The Commission has exclusive jurisdiction to review concentrations that have Community dimension. Hence, authorities of the U.K., as of the other Member States of the European Union, have no jurisdiction to review such transactions. However, in its review of concentrations, the Commission keeps in close and constant liaison with the competent authorities of the Member States.

Generally, transactions are considered to be concentrations when (1) an undertaking acquires direct or indirect control of another undertaking, or (2) two previously independent undertakings merge. A concentration will have "Community dimension" when (1) the combined aggregate world-wide turnover (sales) of all the undertakings concerned exceeds ECU 5 billion, (2) the aggregate Community-wide (i.e., roughly the territory of the 15 Member States of the European Union) turnover of each of at least two of the undertakings concerned exceeds ECU 250 million, and (3) each of the undertakings do not achieve more than two thirds of its aggregate Community-wide turnover within one and the same Member State.

Notified concentrations are reviewed and assessed by a special team in Directorate B of the Commission's Directorate General IV for Competition (DG IV), the so-called "Merger Task Force" (the "MTF"). The MTF has a Director, Mr. Drauz, and three "heads of operational units" beneath him, among which Mr. Metha, who leads the team of case-handlers in charge of the BT/MCI transaction, Messrs. Saba and Quilty. The MTF reports directly to the Director General of DG IV, Mr. Schaub, who in turn reports to the Commissioner in charge of competition matters, Mr. Van Miert. However, final decisions on the merits of all notified concentrations are taken pursuant to a vote of the entire college of the Commission (its President, 2 Vice-Presidents, and 17 Commissioners). Directorate C of DG IV, headed by Mr. Temple-Lang and responsible for reviewing restrictive agreements and abuses of dominant positions, notably in the telecommunications and media sectors, delegated a representative to the MTF team, Mr. Dennes. Furthermore, the MTF consults other Directorates General of the Commission, such as the Legal Service, Directorate General XV (Internal Market), and Directorate XIII (Telecommunications). Attached is a contact list of the Commission case team handling the BT/MCI transaction.

Notifications are made on a form, the so-called "Form CO", on which the parties to the concentration must provide all relevant information to enable the Commission to exercise its control. This information includes information on (1) turnover of the concerned companies, (2) ownership of and control over the concerned companies, (3) personal and financial links, (3) information on the product, services, and geographic markets affected by the concentration, (4) general economic and commercial conditions prevalent in those markets, and (5) how the transaction is likely to affect the interest of intermediate and ultimate consumers and the development of technical progress.

After an initial and preliminary investigation of four weeks (Phase I), a full-scale investigation (Phase II) may be launched by the Commission if it feels that it needs to examine the concentration more closely. During this Phase II procedure, the Commission can issue a formal "statement of objections", to which the parties must reply within a deadline fixed by the Commission. Also, parties are provided with the possibility of an oral hearing. Finally, prior to approving or prohibiting the concentration, the Commission consults with the "Advisory Committee on concentrations", consisting of representatives of the authorities of the Member States. Third parties are heard in all phases of the procedure.

**INTRODUCTION TO REGULATION OF
TELECOMMUNICATIONS IN THE
UNITED KINGDOM WITH
PARTICULAR REFERENCE TO BT**

AN INTRODUCTION TO THE REGULATION OF TELECOMMUNICATIONS IN THE UNITED KINGDOM, WITH PARTICULAR REFERENCE TO BT

1. Introduction

- 1.1 The purpose of this paper is to outline the telecommunications regulatory regime in the UK in which BT operates. That regulatory regime is an essential element of the background to BT's commercial operations: almost every part of its business is, to some extent, governed or affected by that regime.
- 1.2 The guide assumes a general understanding of the machinery of government in the UK. In particular, the administrative law background is very important, since the actions of those who regulate BT, notably the Director General of Telecommunications ("DGT"), are subject to review by the courts through the normal remedies available by way of application for judicial review.
- 1.3 Please note that this paper focuses on UK telecommunications-specific regulation, in particular its effect on BT. BT is also subject to UK and European competition law, in particular the Fair Trading Act 1973, the Competition Act 1980, the Restrictive Trade Practices Act 1976 and Articles 85, 86 and 90 of the Treaty of Rome.

2. History

- 2.1 In the early stages, telephone service was provided in the UK both by the Post Office (then a department of central government) and by a number of local and private operators. Gradually those operators merged with one another and, eventually, with the Post Office, so that by the end of the First World War the only telephone operators in the country were the Post Office and the Corporation of Kingston upon Hull. The Post Office carried on its business as a government department, under the Postmaster General, and was known as the General Post Office or 'GPO' and the Hull Corporation operated under a licence granted by the Post Office.
- 2.2 In 1969, the business of the GPO was transferred by the Post Office Act from central government to a newly created statutory corporation known simply as the 'Post Office'. That corporation had the exclusive privilege under the Act of running telecommunication systems.

- 2.3 The British Telecommunications Act 1981 ("the 1981 Act") transferred the telecommunications business of the Post Office to a separate statutory corporation, British Telecommunications. Like the Post Office, British Telecommunications was managed by a board of members appointed by the Secretary of State. The members were responsible for the day-to-day conduct of the corporation's business in accordance with policy guidelines and financial limits set by the Secretary of State. All finance not generated within the business was obtained from the UK Treasury and was counted towards the public sector borrowing requirement.
- 2.4 British Telecommunications had the same exclusive privilege as the Post Office, but other people could be granted licences to run systems. As part of its policy of liberalisation the Government granted a licence to Mercury Communications Limited ("MCL") in 1982 to compete in the telecommunication services field. The 1981 Act also introduced the possibility of competition in the supply of telecommunication apparatus: British Telecommunications was given power to approve apparatus for supply by others to end-users in competition with its own apparatus.
- 2.5 British Telecommunications moved out of the public sector in 1984. The Telecommunications Act 1984 ("the 1984 Act") provided for the transfer of the corporation's business to a public limited company owned by the UK Government and for the sale of shares in that company to the public. That company is British Telecommunications plc ("BT"). In November and December of that year, the government sold 50.2% of the issued ordinary shares in the company. A further 25% or so of the shares were sold by the Government in 1991, and of the remainder all but 1% or so were sold by the Government in 1993. The UK Government retains a special share in BT.
- 2.6 The 1984 Act instituted a completely new regulatory regime in which BT was to have no power to grant licences, approve apparatus or perform any other regulatory function, and was to have exactly the same status in law as any other person needing a licence to run a telecommunication system. Nevertheless, the Government announced in November 1983 that the provision of the basic telecommunication service of conveying messages over fixed links, domestically and internationally, would for a period of seven years be confined to BT and Mercury. A review of this 'duopoly' policy was undertaken in November 1990. The White Paper¹ resulting from this review set out the Government's intention to increase competition by licensing other operators to provide fixed links within the UK. Some 223 applications overall for licences have been made since the White Paper, and approximately 150 have been granted, including around 16 'public telecommunications operator' licences. Further applications are under consideration.

¹ CM 146, 'Competition and Choice: Telecommunications Policy for the 1990s, March 1991.

3. Some definitions

It will be impossible to understand the structure and significance of the regulatory regime without first examining some of the terms defined in the 1984 Act. These definitions are to be found in Section 4 of the 1984 Act.

- 3.1 **Telecommunication system:** This is defined as a system for the conveyance, through the agency of electro-magnetic and other specified kinds of energy, of speech, music and other sounds, visual images, data, and signals for the actuation or control of machinery or apparatus. These are often known collectively as 'messages'. However, the definition does not say what constitutes a system. This was deliberately left vague so as to avoid adopting an inappropriate and possibly restrictive definition. A distinction must be drawn, however, between a system and a piece of apparatus.

Some help is given in Section 4(2), which provides that a piece of telecommunication apparatus becomes a telecommunication system when it is connected to something which already is a telecommunication system. Thus, a new telephone in its box is a piece of apparatus but once it is plugged into a telephone socket it becomes a telecommunication system in its own right. The effect of this is that it becomes subject to the 1984 Act's licensing regime.

As a result of the wide definition of connection (see 3.3 below), a surprising number of things constitute telecommunication systems. Some examples are domestic radio receivers and any recording equipment connected to them, television sets and video cassette recorders, and hearing aids with telephone amplification facilities.

- 3.2 **Telecommunication service:** the principal type of telecommunication service is a service consisting in the conveyance of messages. The term includes not only the service of conveying messages over a telecommunication system but also:

- a) by virtue of the broad definition of "convey" (Section 4(7)), transmitting, switching or receiving a message,
- b) a directory information service and
- c) the service of installing, maintaining, adjusting, repairing, altering, moving, removing or replacing apparatus which is or is to be connected to a telecommunication system.

- 3.3 **Connection:** in order for two things to be connected for the purposes of the 1984 Act, there need be no physical path between them. Two things (systems or items of apparatus) are connected if a message conveyed by one is then conveyed by the other. It is immaterial that

there was a significant time lapse between the first and subsequent conveyance, but "indirect" connection is excluded from the definition.

4. The main offences

4.1 Like other regulatory regimes in the UK, (and there are a number of similarities between the regimes for telecommunications, gas, electricity and water), the telecommunications regime begins by describing that which is prohibited and then sets out the terms upon which that activity may be carried on. In the 1984 Act, the primary prohibitions are to be found in Section 5. The main offences are:

- a) running a telecommunication system without a valid licence;
- b) running a licensed system to which apparatus or another system is connected when that apparatus or other system is not authorised to be connected; and
- c) providing by means of a licensed system, telecommunication services not authorised by the licence to be provided.

4.2 The Act contains no definition of "running". However, one view is that any person who has overall control over the way in which a telecommunication system is used to convey messages will probably be considered to be running the system. This view is supported by the final words of Section 4(2) of the 1984 Act, which provides that a person who controls the apparatus which under the section is treated as a system, is to be regarded as running the system. In the explanatory memorandum to certain class licences, the Office of Telecommunications ("OfTel") gives informal guidance on the definition of "running" as follows: "run does not refer to the day-to-day operation of a system. It refers rather to authority over the system, in particular to control over how the system is made up and how, and for what purposes, it is to be used". However, ownership in a 'freehold' sense does not necessarily imply that the 'owner' runs the system, as it is perfectly possible to invest in some other person the necessary rights of control to enable that person to run the system. A simple example is a rented telephone or fax machine.

4.3 The offences set out at b) and c) above are committed by the person running the relevant telecommunication system, even though he may not have instigated the unauthorised connection or provision of service and may even be unaware of it. The 1984 Act provides, however, in Section 5(5) and (4) respectively that:

- a) it is a defence for the operator of the system to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence and
- b) the person who made the unauthorised connection or provided the unauthorised service may be convicted of the primary offence.

4.4 Section 6 contains certain exemptions from the Section 5 offences. These include in particular:

- a) domestic radio and television sets receiving material broadcast for general reception;
- b) the running of a system which is not connected to any other system and which satisfies certain conditions as set out in that section; and
- c) semaphore.

5. Licensing

5.1 Licences for the running of telecommunication systems may be granted, under Section 7 of the 1984 Act, by the Secretary of State or, with his consent, by the Director General of Telecommunications ('DGT') (*see 11.2 below*). The Secretary of State generally consults the DGT when exercising his licensing functions.

5.2 It is important to remember that the only activity in respect of which a licence may be granted is the running of telecommunication systems. A person does not need a licence simply to provide a telecommunication service by means of someone else's system or to connect apparatus to someone's system (though in this latter example he will need a licence to run his own system, for the act of connecting the apparatus will convert it into a system which he will then be running).

5.3 A licence granted under Section 7 of the 1984 Act will invariably contain provisions:

- a) authorising the running of a defined telecommunication system, invariably referred to as 'the Applicable Systems';

- b) authorising the provision of specified telecommunication services by means of that system;
- c) authorising the connection to that system of certain apparatus and certain other systems;
- d) imposing conditions to be observed by the licensee;
- e) setting out the circumstances in which the licence may be revoked; and
- f) where plant will have to be laid on the public highway or on land belonging to others, applying the telecommunications code (contained in Schedule 2 to the 1984 Act) and limiting or qualifying the provisions of that code.

5.4 The distinction between the authorisations mentioned at a), b) and c) above and the conditions mentioned at d) above is critical. The authorisations may be enforced only by criminal proceedings under Section 5 of the 1984 Act, and the conditions may be enforced only under the procedures set out in Sections 16 to 18 of the 1984 Act (*see 12.3 below*). Furthermore, conditions may be modified (*see 12.3 below*), but other parts of the Licence, e.g. the authorisations, cannot.

5.5 The authorisations contained in Schedule 3 of BT's main operating licence are expressed in very broad terms. Any duly approved apparatus may be connected (*for the approvals regime see 8 below*); a wide range of other systems may be connected, and almost any service may be provided by means of the systems run under that licence. Note, however, that the licence does not authorise:

- a) the conveyance, by means of those systems, of licensed cable programme services; or
- b) the provision of mobile radio services, such as cellular radio or paging.

This leads to 'asymmetry' between BT and local cable TV operators, who are authorised to provide local telephony services, and between BT and mobile operators, who, since the White Paper, have received authorisation to provide fixed services as well as mobile. In the meantime, asymmetry vis-à-vis cable operators will remain until (probably) 2001.

5.6 BT's activities in mobile radio and cable television are governed by other licences granted to the company and its subsidiaries. Thus, for example, BT has a separate licence for its paging service, and Telecom Securicor Cellular Radio Limited ("TSCR"), known as "Cellnet", a 60:40 joint venture between BT and Securicor, is also separately licensed. To enable calls to be made to or from mobiles,

BT interconnects (see later) its fixed systems with the systems of Cellnet and the other mobile operators. BT also has a separate subsidiary, Broadband Ventures Limited, for running and laying Cable TV networks, and owns 100% of Westminster Cable Company Limited. It has disposed of most of its other cable TV interests, apart from "SMATV" systems in a few new towns.

6. Public Telecommunications Operators

- 6.1 A licence under Section 7 of the 1984 Act may be granted to a particular person, to a class of persons or to all persons generally. A large number of individual licences, and several class licences, have been granted. If a licence granted to a particular person contains conditions imposing upon the licensee certain public service and fair trading obligations, the system which is the subject of that licence may be designated by the Secretary of State (by order laid before Parliament) as a public telecommunication system, making the licensee a public telecommunication operator ('PTO').
- 6.2 A PTO licence will normally apply the telecommunications code to the PTO. The code, set out in Schedule 2 to the 1984 Act, sets out the powers under which PTOs are empowered to install their systems in other people's land, dig up the streets, etc. In addition, certain provisions, such as Section 43 (sending of obscene etc messages) and Section 45 (disclosure of certain information) and the provisions of the Interception of Communications Act 1985 about 'telephone tapping', relate to public telecommunication systems.
- 6.3 Until 1991, the only PTOs were BT, MCL, Kingston Communications (Hull) plc (the three main fixed link operators), Vodafone and Cellnet (the two cellular radio operators), the two PCN operators, and the local broadband cable TV companies (one in each cable TV franchise area). Since the White Paper, some sixteen new PTO licences have been granted, some national and some regional, in particular Ionica, Energis, COLT, AT&T, MFS, Scottish Power and Torch. BT's status as a PTO does not extend to any of its subsidiaries except insofar as they have their own licences and appropriate designations, e.g. Cellnet. The 1991 White Paper (which is still the UK Government's blue-print for telecoms policy) made it clear that the Government's intention was to issue further PTO licences to provide fixed links, with a presumption in favour of licences being issued, and the Government have been fulfilling that intention. On the whole, the new operators are not subjected to anything like the same obligations as BT, and in particular have very little in the way of service obligation, and are not subject to any price controls, and hence have much greater pricing freedom and other freedoms than BT.
- 6.4 In addition, the DTI will shortly be granting a number of international facilities licences. Until this year, Government policy was to limit to a

duopoly of BT and Mercury the right to connect systems directly to overseas systems. In response to the EU requirement to liberalise infrastructure for all purposes other than public voice from 1 July this year, and other pressures, the Government have now decided to liberalise international services forthwith. Some 46 applications for international facilities licences have been received, and the DTI have consulted publicly on the form of the licence, which will be a PTO licence.

- 6.5 Apart from its licences under the 1984 Act, BT and its subsidiaries have a number of other licences which enable them to carry on business. For example in respect of their use of radio (both in mobile applications and in the fixed network), BT and Cellnet have licences under the Wireless Telegraphy Act 1949, and in respect of its cable television activities, Westminster has a licence under the Cable and Broadcasting Act 1984, which now takes effect under the Broadcasting Act 1990.

7. Class Licences and other Individual Licences

- 7.1 Apart from the PTOs, there are a number of operators who have individual licences for the running of systems, usually conveying only their own messages or those of a limited number of people with whom they have some common interest. Typical examples are local authorities and universities. There are also licences for paging services and for the provision of private mobile radio services. Of particular significance recently has been the granting of licences to provide International Simple Resale Services, e.g. to ACC, Telia International and Concert.
- 7.2 The vast majority of systems, however, are run under class licences, of which the most important are the Telecommunication Services Licence ('TSL') and the Self Provision Licence ('SPL'), which came into effect from 1 September 1992. The TSL replaced the class licence formerly known as the Branch Systems General Licence, or 'BSGL'. Both the TSL and SPL were revoked and reissued with effect from 9 September 1996. In addition, there are other class licences e.g. for mobile apparatus, for satellite down-link 'receive only' dishes, and for the provision of satellite services.
- 7.3 The TSL and the SPL are intended to be mutually exclusive. The former is for licensees who will be providing telecommunication services to others, while the latter is for persons who will not be doing so except for members of their own group.
- 7.4 The two Licences are very similar, but their different purposes are reflected in certain differences between them:
- (a) Under the TSL, the systems authorised to be run are limited in geographical extent, as was the case in respect of the BSGL

(the '200 metre' rule), so that, for example, a company wishing to link sites for telecoms purposes will have to obtain private circuits between them (unless they are less than 200 metres apart) from a PTO. In the case of the SPL, there is no such limitation, so that if you can get appropriate wayleaves etc, you can run a system anywhere, and if all you want to do is link up your sites, and not provide a service to others, the 200 metre rule will not apply.

- (b) The SPL authorises the provision of any conveyance telecommunication services (other than television) provided they are not provided outside the Licensee's Group. The TSL authorises the provision of any telecommunication services to any persons, with certain exceptions, in particular International Simple Voice Resale (for which separate individual Licences are available), International Simple Data Resale (except as specified by the Secretary of State) and television broadcast. Thus, subject to these exceptions, the TSL permits private operators to provide service to others, including services which bypass the public switched networks of BT, MCL and other PTOs. These can be provided by means of private circuits hired from a fixed link operator such as BT or MCL (or any other operator licensed to provide fixed links). Formerly, there were substantial restrictions on the use of private circuits, designed to prevent bypass of the trunk network. These were nearly all scrapped when the BSGl was revised in 1989.
- (c) The TSL contains a few conditions appropriate to a Licensee providing services as a business.

The re-issued TSL and SPL include new rules on recording telephone conversations.

- 7.5 The definition of 'Applicable System' in the TSL and SPL is wide enough to encompass everything from a simple telephone (which is a system by virtue of Section 4(2) when plugged into a public network) to a large business switchboard (private automatic branch exchange or "PABX") serving thousands of extensions in a large office block.
- 7.6 Under the 1992 revision of the BSGl (which became the TSL) BT was able to operate only in Hull. In the 1996 revision of the TSL, BT and Hull are still specifically excluded from running under the TSL except outside their own areas. Other PTOs are only excluded if they are specified by the Secretary of State. None have been so specified. One effect of the 1992 revision was that it ceases to be an offence for a person to include unapproved apparatus in his system, and for BT to connect its systems to a system including such apparatus.

8. Apparatus Approval

- 8.1 The UK Government recognised from the outset that it would not be possible to allow equipment to be connected to public telecommunication systems without first ensuring that the equipment did not endanger the safety of the PTOs' employees or compromise the technical integrity of the public networks. This is the principal reason for the offence of unauthorised connection (paragraph 4. above).
- 8.2 The DGT has authority delegated by the Secretary of State to set standards and to issue approvals for apparatus to be connected to systems, and to set standards to which apparatus must conform if it is to be approved (Section 22 of the 1984 Act). The technical aspects of standards are agreed in consultation with the PTOs, the equipment manufacturers and the British Standards Institution. Testing of apparatus is carried out by a number of laboratories and the British Approvals Board for Telecommunications determines whether the laboratory results indicate that the apparatus conforms to the standard or is otherwise fit for approval.
- 8.3 Section 22 of the 1984 Act provides that where a licence includes provisions framed by reference to apparatus being approved under the section, then apparatus may be approved by the Secretary of State or by the DGT under delegated powers. PTO licences such as BT's do not require the apparatus forming part of the PTO systems to be approved. In 1992, Regulations were made implementing an EC Directive on approvals, and generally, through ETSI, the European Telecommunication Standards Institute, the European Union is seeking to bring about common, harmonised, standards throughout the EU and EEA. The 1992 Regulations have had little impact so far, largely because few 'common technical regulations' have emanated from ETSI.

9. The Conditions in the BT Licence

- 9.1 The conditions in BT's main operating licence are, roughly speaking, divided into three types: "service obligations", "fair trading" conditions and ancillary provisions. BT is of course also subject to UK and EU competition law provisions.
- 9.2 The conditions are designed to protect customers and competition. Some conditions are focused on customers (e.g. Condition 16), some are focused on competition (Condition 13) and some are focused on both.
- 9.3 The major licence conditions are set out below:

Condition 1

is commonly referred to as BT's "universal service obligation". It imposes on BT the basic duty of providing throughout the UK (except in the Hull area, where BT is prohibited from serving customers directly) the full range of telecommunication services consisting in the conveyance of messages except where Ofel determines that there is an adequate alternative. Ofel has interpreted this Condition to mean that if a customer is willing to pay for a service BT must provide it irrespective of the cost or inconvenience. BT is also obliged to install and keep installed "Applicable Systems" for the purpose of providing the service. Ofel are currently developing proposals for the burden of the Universal Service Obligation to be shared between operators.

Condition 3

obliges BT to provide directory enquiry services (which must be free in the case of blind people and other severely disabled people) and on written request, paper directories, and to provide other operators with directory information, including copies of the DQ database, or on-line access thereto, for their own DQ service. Ofel are currently developing proposals to increase competition in this area.

Condition 6

obliges BT to provide free public emergency call services (i.e. the '999' service).

Condition 11

obliges BT to provide voice telephony and directory information services at its public call boxes, and limits BT's freedom to cease to provide services at a public call box.

Condition 13

obliges BT to interconnect its networks with those of other PTOs who wish to be connected. The aim of the condition is that any customer of one PTO should be able to call any customer of another PTO without undue difficulty and should be able to choose which PTO carries the call for all or part of its length. This necessarily envisages calls starting on one network, transferring to another network and then ending up on the original network or a third network. Such an arrangement would allow a BT exchange line customer to call another BT customer using the long distance lines of MCL or another national PTO.

Ideally, the two PTOs should agree the terms for their interconnection. If they fail to do so, as BT and MCL did in 1985, the DGT may fix those terms which have not been agreed, including interconnect charges, which he must determine on the basis of fully allocated costs plus a reasonable return on relevant capital. The DGT also has power under Condition 13 to enforce the terms of an interconnection agreement

(whether reached consensually or fixed by him) as if the agreement were contained in the conditions of the operators' licences.

The DGT has no independent authority to review interconnection agreements once made, but most agreements contain specific provision for the DGT to review them (in effect rather like an arbitrator) at the request of one of the parties if the parties cannot agree amendments. Thus in December 1993, the DGT determined new charges for the interconnection agreement between BT and MCL. In March 1995, the Condition was substantially amended effectively to require the DGT to determine standard charges for standard interconnect services, and to provide a procedure and mechanism for charges, which are initially calculated against the previous year's costs, to be updated annually against the actual costs of the relevant year.

Oftel is currently developing proposals to replace all the provisions concerning determinations by the DGT of interconnection charges, terms and conditions with flexibility for BT to fix its interconnection charges within floor and ceiling price capping baskets of network services (price caps will be set according to the long-run incremental costs methodology with a mark-up to cover common costs). In addition, certain services will be individually price capped. The new regime is intended to come into force on 1 August 1997. This charging regime will of course remain subject to the transparency Conditions 16A and 16B and the non-discrimination Condition 17, which are described below.

Condition 13A

provides for the introduction of Equal Access, under which a customer can decide, either on the basis of preselection for all calls, or on a call by call basis, which operator to route his long distance calls through. After 31 December 1992 and if certain conditions are met, the DGT can make a direction to BT to make Equal Access available in respect of any other operator who requests it. In default of agreement, he can determine the terms on which it will be made available.

Condition 14

obliges BT to connect its system to a system of a customer which is composed of approved apparatus. The terms are standard and published in accordance with Condition 16.

Condition 15

inter alia, obliges BT to allow other people to provide services over its network. The DG is currently developing proposals for a new regime for service providers, including a special set of tariffs pitched somewhere between interconnect (cost plus) prices and retail prices. (See also Condition 16 below).

Condition 16

obliges BT to publish the terms and conditions, including charges, of telecommunication services which it provides under an obligation in the Licence, unless the DGT consents otherwise. It is obliged to adhere to those terms and conditions and to give Ofel and the public at least 28 days' notice of any variation in them (two months notice in the case of private circuit charges, in accordance with the EC Leased Lines Directive).

Condition 16A

provides for publication of interconnection agreements.

Condition 16B

which was added to the Licence in March 1995, requires BT to refer to the DGT for determination the charges to be paid by other operators for a list of standard services and to refer them to him annually for redetermination, to ensure that all other operators pay the same charge for the same standard services, and ensure that internal transfer charges for the use of BT's network are effectively the same as charges to other operators. Condition 16B also contains an obligation on BT to maintain a list of standard services identifying charges to be paid by operators, amounts applied to network components and the unit costs transfer charged internally for each network component.

Condition 17

prohibits BT from exercising "undue discrimination" or "undue preference" in respect of any services of the sort (in effect) to which Condition 16 applies: mainly network services, but including also the terms and conditions of interconnection. It also applies to enhanced services. Not only must BT not discriminate unduly between its customers: it must also not unfairly favour any of its own businesses to the significant competitive disadvantage of competitors. Ofel has recently applied Condition 17 against BT strictly.

Conditions 17B and 17C

were added to the Licence in March 1995. Respectively, they prohibit BT from unduly discriminating between, or preferring, other operators in respect of the quality of any standard interconnect service or private circuit provided to them, and provide for the creation of a Quality Schedule relating to those services against which BT's performance is to be measured.

Condition 18

enables the DGT to make a direction to BT if he considers that BT is unfairly cross-subsidising:

- a) its apparatus supply business ('ASB') in the United Kingdom,
- b) the production of telecommunication apparatus by certain subsidiaries in the United Kingdom (this is no longer relevant as BT has disposed of virtually all of its production capability).
- c) the provision in the United Kingdom of mobile radio services, and
- d) its value-added and data services (the 'Supplemental Services Business'). In association with their proposals for service providers, Oftel is now proposing to redefine the SSB, so that it essentially only includes enhanced services, while all 'basic' services will be classified as Systems Business.

This Condition is largely rendered obsolete by Condition 20B.15 (post).

Condition 18

was originally backed up by **Condition 20**, which requires BT to maintain separate accounts for certain specified Businesses, and provide financial statements to the DGT. Condition 20 is now overshadowed by Condition 20B.

Condition 18A

prohibits acts or omissions which the DGT regards as preventing, restricting or distorting competition, notably anti-competitive agreements and concerted practices and abuse of a dominant position. The Condition comes into force on 31 December 1996.²

Condition 20B

provides for accounting separation, and was added to the Licence in March 1995 following widespread public consultation over an extended period. The purpose of accounting separation is to enable the DGT to decide if BT is unfairly subsidising or cross-subsidising, or unduly preferring or discriminating, and to enable him to set interconnect charges which are properly and transparently related to the relevant costs. BT is required to maintain separate accounting records for its Access Business, Network Business, Retail Systems Business, Apparatus Supply Business, Supplemental Services Business and

² Although BT consented to the new Condition, it had been advised that the Condition is ultra vires the DGT and is unlawful and it has brought proceedings in which the court will rule on the lawfulness of the Condition.

'Residual' Business, and certain sub-divisions of some of those Businesses, and to produce (and publish, subject to the DGT consenting otherwise) annual (and interim) audited financial statements for each of them; and the DGT is given wider powers by para. 20B.15 to investigate and issue directions to BT in relation to subsidy or cross-subsidy of those Businesses or (except in relation to the Residual Business) any parts of them. The DGT is expected to issue guidelines about his intended exercise of these powers soon. The DGT is also given potentially wide powers in certain circumstances to require BT to alter the basis of accounting separation.

Condition 24A

applies a 'RPI-X'³ cap to the amount by which the aggregate prices of BT's services may be increased in certain fields. About 2/3 of BT's revenue is currently covered by the limit set by this Condition, which originally only covered line rentals and inland calls. In 1989, a new 'basket' for inland private circuits was added, and under the liberalisation review, international calls and international private circuits were added to the respective baskets.

For the period 1 August 1993-31 July 1997 the price cap is set at RPI-7.5. The Condition does not simply limit price increases: if the RPI increases by less than 7.5% in any relevant year, the basket of controlled prices must be reduced accordingly. Furthermore, individual prices in the 'basket' may not be increased by more than RPI-0 in any year.

For Private Circuits, there are separate RPI-0 baskets for inland analogue, inland digital and international private circuits, with RPI+2 and RPI+1 caps on individual analogue and digital prices respectively.

In addition, a special Low User Scheme to benefit the lower quartile of BT's customers has been included in the Licence (Condition 24D), and BT's installation charge for residential premises has been limited to £99 (excluding VAT) (Condition 26). There are specific provisions preventing volume discounts on standard prices and certain other rental/call charge packages being used to contribute towards achievement by BT of RPI-7.5.

BT and Oftel have now agreed on the price cap to replace RPI-7.5 with effect from 01 August 1997. There will be a cap of RPI-4.5 on a narrower basket confined to the bottom 80% of residential customers. Tariffs for business customers and the top 20% of residential customers will no longer be price-capped.

³ 'Retail Price Index'. The Cap is calculated on the basis of the increase in the Retail Price Index less a percentage.

The Private Circuit price cap has also been amended, so that there will be RPI+0 caps on separate baskets for inland analogue PCs and digital PCs up to 64 kbit/s. There will also be an RPI+0 cap on individual IPLC routes.

Condition 24F

was also added in March 1995, requiring BT to obtain the DGT's consent to any individual 'basket' price below fully allocated cost, and providing for adjustments to interconnect charges to take account of changes in 'basket' prices.

Condition 25

effectively requires BT to charge a uniform rental throughout its Licensed Area for single exchange lines. This condition is deleted as from 31 December 1996.

Conditions 33A and 33B

were added as a result of the Monopolies and Mergers Commission ("MMC") investigation in 1988/89 into Chatline and other Premium Rate Services. The former prohibits BT from serving Chatline and other live conversation service providers unless there is in force a Code of Practice recognised by the DGT; the latter enables the DGT to direct BT to provide certain facilities (when technically and economically practicable) which will enable customers to exercise better control over their phone bills e.g. itemised billing and call barring. (As a result, group chatlines are now prohibited in the UK since there is no code of practice relating to them recognised by the DGT).

Condition 34B

provides for BT's numbering plan to be revised in accordance with a Specified Numbering Scheme made by the DGT following publication by him of Numbering Conventions.

Condition 34C

was inserted in the Licence by the DGT following the MMC investigation into number portability. If directed to do so, BT must provide number portability, in accordance with a 'Functional Specification', to a 'Qualifying Operator' - one who is able and willing to provide reciprocal portability. BT is entitled to recover certain costs, as recommended by the MMC, which may be determined by the DGT.

Condition 35

prohibits certain linked sales. This condition is deleted as from 31 December 1996 as a result of the inclusion in the Licence of Condition 18A.

Condition 36

prohibits certain exclusive deals in relation to telecommunication apparatus. This condition is also to be deleted as from 31 December 1996

Conditions 38 and 38A

provide respectively for BT to ensure that its employees observe the provisions of Codes of Practice relating to the disclosure of customer information outside the Systems Business and Supplemental Services Business (defined in Condition 18).

Condition 39

enables the DGT to make a direction to BT where he considers that intellectual property rights are being, or are likely to be, exercised so as to prevent systems being connected to BT's System or services being provided over that System.

Condition 46

(as amended) requires BT to provide private circuits to another PTO where that PTO is authorised by its licence to provide the type of circuit concerned, unless it will be relying unduly on BT to satisfy its licence obligations.

Condition 49

requires BT to give Oftel advance notice of joint venture arrangements involving the creation of a body corporate to run a telecommunications system. Oftel has no specific power to prohibit BT from participating in any joint venture: the aim of this condition is simply to forewarn Oftel so as to allow it to exercise one of the general powers which it possesses. This provision is also deleted as from 31 December 1996.

Condition 50

enables the DGT to prevent BT from operating through a subsidiary so as to avoid its obligations under the Licence.

Condition 52

obliges BT to provide to Oftel information etc reasonably required by them for the purpose of carrying out their functions.

Condition 53

contains exceptions to the obligations set out in the conditions, such as impracticability and certain categories of force majeure. In particular, BT is not obliged to provide service to a person who is in breach of a contract with BT for telecommunication services and is not obliged to provide a service where it has notified OfTel that it is trialling the service's technical feasibility or commercial prospects.

10. EEC/EU Initiatives

- 10.1 A number of Directives in the field of telecommunications have emanated from Brussels and more are anticipated. Some of these are made under Article 90 of the EEC Treaty, intended to liberalise services previously the subject of state-owned monopolies; others are intended to harmonise throughout the EU/EEA the nature, technical standards, quality and provision of telecommunication services on the basis of 'Open Network Provision', the key features of which are transparency and non-discrimination. These latter Directives are made under Article 100. There have been ONP Directives on Leased Lines and Telephony, and Directives on Licensing and Interconnection are likely to be adopted this year. Also in the pipeline are Directives amending the existing Directives. In addition, the Procurement Directive, requiring open tendering and public notice of tenders, has been applied in the UK to BT's procurement.
- 10.2 In addition the European Commission is pushing ahead with liberalisation. Directives have been adopted, which must be implemented by Member States, requiring the liberalisation this year of all services other than public voice, including mobile and satellite services. Public voice services are to be liberalised by 01 January 1998, or later for some of the less developed countries of the EU, although until then they will largely remain the preserve of the state-owned monopolies of continental Europe. At the same time, infrastructure will be fully liberalised. Infrastructure must have been liberalised by 01 July 1996 for all services other than public voice.
- 10.3 It is to be noted that the UK is far ahead of the rest of Europe in liberalisation and the development of competition in the telecommunications sector.

11. UK Competition Law and Regulation

- 11.1 Part of the purpose of the 1984 Act (which provided a model for the subsequent privatisation of gas, electricity and water), was to set up an independent regulator who would supervise and enforce the regulatory regime and advise the DTI. The regulator is the DGT, who heads the Office of Telecommunications, commonly known as OfTel but the regime is only part of the system of controls available under the Fair

Trading Act 1973, the Restrictive Trade Practices Act 1976, the Competition Act 1980 and the Telecommunications Act 1984.

- 11.2 The office of the DGT was created by the 1984 Act, and his powers and duties derive from that Act. He is responsible for the day-to-day administration of the regulatory regime and has certain powers relating to the modification of Conditions of licences and the approval of apparatus delegated to him by the DTI. The DTI itself retains the powers of granting licences under the Act and formulates general policy and strategy in the telecommunications field. For example, the DTI initiates major programmes of liberalisation (such as the duopoly review and the initiatives which have flowed from it) and represents the United Kingdom in international debate on telecommunications policies. In carrying out these functions, the DTI often seeks advice from Oftel but is careful to retain to itself the prime position.

12. The Powers and Duties of the DGT

- 12.1 Although it is convenient to refer to the powers and duties of Oftel, strictly speaking the 1984 Act imposes duties and confers powers on the DGT. Obviously, he could not exercise all those duties and powers himself and so delegates much of the day-to-day performance to Oftel officials.
- 12.2 The duties and powers of the DGT are to be found principally in the 1984 Act and licences granted under the 1984 Act. In the background to the exercise of some of his functions is Section 3 of the Act which sets out certain objectives by which the DGT is to discharge them is achieved. These are in two categories: the overriding criteria are that the DGT must exercise his functions in the way which he considers is best calculated to secure that telecommunication services are provided to meet all reasonable demand and that the operators are able to finance such provision; the subordinate criteria include exercising his functions in the way which he considers is best calculated to promote the interests of consumers, promote effective competition and promote the United Kingdom industry's international competitiveness. These criteria are vague and general, and include a substantial element of discretion. It is almost impossible for the DGT to be unable in any case to find a criterion which would justify a particular course of action, and particular facts may throw up inconsistencies between criteria.
- 12.3 The most important functions of the DGT are:
- (a) to enforce licence conditions (sections 16 - 18). If it appears to the DGT that a licensee is contravening a licence condition or has done so and is likely to do so again and the matter is urgent, he may make a provisional enforcement order. A provisional order may come into effect immediately. It is notified to the operator and may remain valid for up to 3 months. If it is confirmed before it expires, it becomes permanent. If he is

satisfied that a licensee is contravening a licence condition, or has contravened and is likely to do so again, he must make a final enforcement order. The making of a final order or the confirmation of a provisional order requires not less than 28 days' public consultation and may be permanent in effect.

A licence enforcement order produces no immediate legal effect: it does not of itself give rise to any penalty or right of compensation. If the licensee contravenes the order, however, civil proceedings will lie for the enforcement of the order by injunction or for damages at the suit of anyone who suffers loss. Section 18 contains a special procedure, akin to judicial review, for challenging final or provisional orders.

- (b) modification of licence conditions (Sections 12 and 13 to 15). The conditions of a licence may be modified under Section 12 by agreement between the licensee and the DGT, or under Section 15 in the absence of agreement following a reference by the DGT to the MMC under Section 13. If, on a reference, the MMC determines that a matter referred to them operates or may be expected to operate against the public interest and specifies an amendment of the licence which would be an appropriate remedy, the DGT must make an amendment which, in his opinion, is requisite to remedy the adverse effects found by the MMC. He must have regard to the modifications specified by the MMC, but he does not have to follow them.
- (c) Fair Trading Act and Competition Act Functions: Section 50 transfers to the DGT (and allows the transfer to the DGT of) functions under the Fair Trading Act 1973 (the "1973 Act") and the Competition Act 1980 (the "1980 Act").

(i) Section 50(1) makes it the DGT's duty, once requested by the (Director General of Fair Trading ("DGFT"), to exercise certain functions under the 1973 Act for the protection of consumers. Where an objectionable course of conduct is identified, the DGT may seek from the licensee a written assurance that it will refrain from it. In the absence of such an assurance, he may refer the matter to the Restrictive Practices Court⁴ which, if preconditions are met, can order the licensee to refrain from so acting.

(ii) Under Sections 50(2) and (3) the DGT exercises powers under the 1973 and 1980 Acts concurrently with the DGFT. In exercise of his 1973 Act powers, the DGT may exact information and may make monopoly references to the MMC in relation to telecommunication matters (other than the running of a telecommunication system). If an MMC report specifies that the

⁴ or in minor cases other lower courts

monopoly situation has effects adverse to the public interest, the DGT, if requested to do so by the Secretary of State, must seek undertakings from a licensee to take action to remedy or prevent the adverse effect. If undertakings are not forthcoming, the DGT must advise the Secretary of State who may make compliance orders.

(iii) In exercise of his 1980 Act powers, the DGT may investigate courses of conduct which have or are likely to have the effect of restricting, distorting or preventing competition in respect of telecommunications in defined circumstances. If it appears to the DGT that a licensee may be so acting, he may seek undertakings or in the absence of these make a reference to the MMC. Upon receipt of an MMC report of anti-competitive practices which operate or might be expected to operate against the public interest, the Secretary of State may request the DGT to seek undertakings. If undertakings are not forthcoming, the Secretary of State may make appropriate orders.

- (d) approval of apparatus (see 8. above)
- (e) advising Secretary of State and keeping telecommunications activities under review (Section 47). This includes a limited power for the Secretary of State to give the DGT directions as to considerations which he should take into account.
- (f) publishing information in the interests of consumers, purchasers and other users (Section 48).
- (g) investigation of complaints about telecommunication services or apparatus, unless they are frivolous (Section 49).

12.4 An ancillary power of the DGT is to demand information from licensees. Section 53 contains a specific power to obtain information for specific purposes. Most licences, however, (e.g. Condition 52 of BT's licence) contain a much wider power for him to demand information from the Licensee concerned for the purpose of exercising any of his functions.

12.5 The DGT also has an extensive range of powers and discretions under the licences granted to operators, particularly to BT and other PTOs (see the Conditions in BT's Licence described earlier in this paper).

13. Citizens' Charter

The Competition and Service (Utilities) Act 1992 applied the Citizen's Charter to the telecommunications, gas, electricity and water 'utilities', and the aim was to bring the powers of all four regulators up to the level of the strongest, electricity. The result was that a substantial